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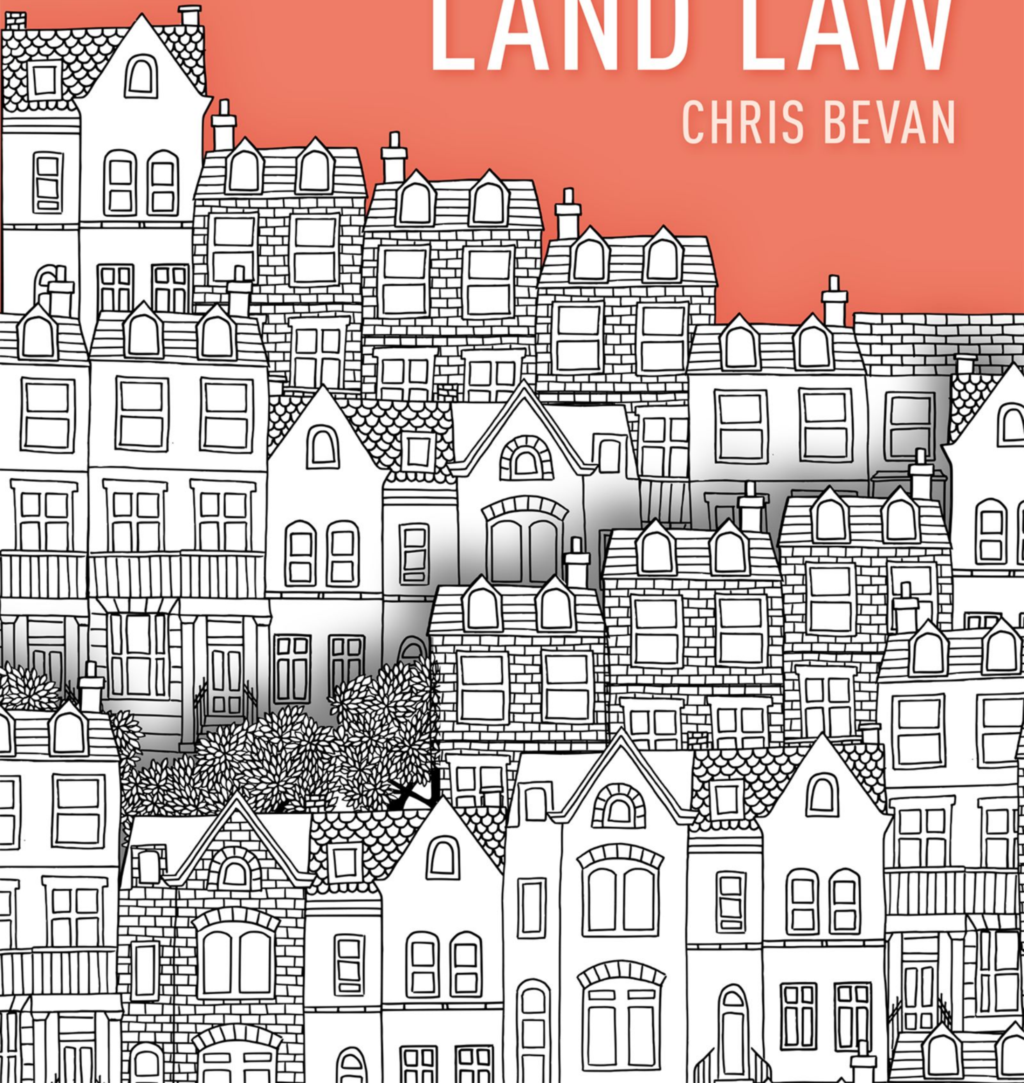
THIRD EDITION

LAND LAW

CHRIS BEVAN



Land Law

Third Edition

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Brief Contents

Detailed Contents

Preface

For students coming to the subject for the first time, land law can appear tricky and unfamiliar. This may be unsettling but worry not, this initial apprehension is entirely normal. Land law owes a lot to its historical past and, in particular, draws heavily on terminology and language that often feels antiquated to a modern audience. What's more, there is a commonly peddled misconception that land law cannot compete with the sexiness of, say, the criminal law, with its feverish, fast-paced depiction in televised dramas. In fact, land law is not dry at all but is a deeply stimulating and vital body of law which reaches into many of the most important moments in life. Land is the stage on which our lives play out. Land law provides the scaffolding which supports that stage. But land law is about much more than just soil and boundary fences. It is about people. It is about relationships. It is about you and me. It is about that essential cry: 'this is mine and not yours'. It is important to us all, so when you lean into this subject and embrace the colours and flavours that it has to offer, you will thrive. That is where this book comes in.

This book serves to blast away any worries you may have, tear down barriers to understanding, and cast a searching and energizing spotlight over the complexities and uncertainties of the law. This book offers a clear, vibrant, and readily understandable study of the key land law principles across its 14 chapters to prepare you for success. The aim is to provide as concise as possible an account of the law without, of course, imagining that its some 629 pages can possibly cover everything. The focus is on helping you to understand and apply the legal principles rather than delivering an encyclopaedic treatment of the law. In this book, I have adopted a more informal writing style to help you in this endeavour and to invite you into this exciting subject. I have also offered case citations using case names and dates only so as not to clog up the text, but please do remember to stick to formality in your land law essays, both in terms of writing style and making use of full case citations where appropriate (see the Table of Cases for the full citations for this book). For me, land law is a fresh, modern, and inclusive discipline, so to reflect this I have made broad use of female pronouns in contrast to the traditional textbook's male preference. Beyond this, the book includes a number of further features designed to aid your understanding:

- Key cases in each topic area are displayed distinctly in case boxes so that you can easily identify the most seminal court judgments. Note, however, that this is no substitute for reading case law in full which, naturally, you are strongly encouraged to do. It is in the reading of judgments that cases really come alive.
- Important academic thinkers are identified, further reading suggestions made, and extracts from journal articles drawn out clearly in the text.
- Frequent, carefully constructed diagrams, flowcharts, and tables help you to visualize and absorb the more complex aspects of the law.
- Generous use of headings, subheadings, and bulleted and numbered lists break down the text and make for a more digestible read.
- A 'Future directions' section at the close of each chapter explores hot debates in the topic area and considers where the law may be going next.
- A comprehensive glossary is included at the end of the book as a reference tool to dip into to help you grasp important land law concepts and terminology.

- Extensive online resources (www.oup.com/he/bevan3e/) as detailed on page xv, to help you to check your understanding and revise, answer essay questions, stay updated on developments in land law since publication, and engage even further with the debates and cases covered in the book.

Of course, like other areas of the law, land law has its fair share of fascinating complexities, depths, and nuances which cannot and should not be overlooked. Whilst seeking to offer clarity, this book therefore does not shy away from exploring these thornier issues which will help you to gain a comprehensive and rounded understanding of the law. At all times, however, my aim in writing this book has been to provide a lively, thought-provoking yet readable text that motivates, enthuses, and engages you, as students of land law, in the joys of this great subject. I hope that once you have read the book, you will share my passion for land law—on which note, please don't hesitate to get in touch with me directly if you have any questions or feedback: my email address is: christopher.w.bevan@durham.ac.uk.

Enjoy it!

Acknowledgements

As I have discovered in writing this book, there is much more to the exercise than merely putting words on the page. Rather, the process has involved genuine collaboration and I have drawn real support from a whole raft of sources. In this vein and for this third edition, I remain sincerely grateful to the outstanding team at OUP who have shown me nothing but brimming enthusiasm, energy, and encouragement at all stages of the production of this book. In particular, I express my keenest gratitude to Lucy Read and Emma Sheffield who have walked every step of the project with me. I thank also those academic colleagues who provided invaluable feedback on the second edition which, as a result, I am in no doubt, have resulted in this third edition being a better work.

A textbook is a living, breathing, and shifting creature and, as this the third edition is published, I remain indebted to my students past and present who are easily the most rewarding aspect of my job. It is for them that this book is written and it is they who unwittingly sound in and have helped to shape every page and who are a continued inspiration to make the book as clear and effective as it can possibly be. In the two years since the second edition was published, the university sector (like the whole of society) has been shaken by the Covid-19 pandemic. This has presented unprecedented challenges, unexpected opportunities, and welcome space to reflect on what teaching land law really means and how a textbook such as mine can guide students towards whatever shape their learning may take. This essential reflection has been deeply productive in informing this third edition.

Once again to those who are, it seems to me, all too-often underacknowledged when books are written: family. To Mum, Bill, and Claire, I thank you for the unswerving belief and confidence you always have in me when I do not. To Andy, I thank you for your unending and sustaining support, for keeping me sane in ways no one else can and, above all, for being the light of my life. Finally, to two great friends to whom this book remains dedicated: Eddie and Dennis.

Chris Bevan
Durham
September 2021

New to this Edition

Updates to the approach in the third edition:

- Enhanced and expanded discussion of fixtures and chattels, adverse possession, and leasehold covenants
- New and improved figures, tables, and flowcharts
- New animated diagrams and example legal documents with annotation on the online resources: **www.oup.com/he/bevan3e/**. See the 'Guide to Using the Book' page for advice on how the book's extensive online resources can help with your understanding of the topics you find most difficult.

New cases explored in the third edition:

- On fixtures and chattels: *Royal Parks v Bluebird Boats* (2021); *Spielplatz Ltd v Pearson* (2015)
- On items found in or on land: *Moffat v Kazana* (1969); *Waverley Borough Council v Fletcher* (1995); *Parker v British Airways Board* (1982)
- On registered land: *Ali v Dinc* (2020); *Patel v Freddy's* (2017); *Rees v 82 Portland Place* (2020); *Dhillon v Barclays Bank plc* (2020); *Knight v Fernley* (2021); *Pennistone Holdings Ltd v Rock Ferry Waterfront Trust* (2021)
- On adverse possession: *Amirtharaja v White* (2021); *Greenmanor Ltd v Pilford* (2012); *Chambers v London Borough of Havering* (2011); *Fruin v Fruin* (1983); *Port of London v Ashmore* (2010); *Roberts v Swangrove Estates Ltd* (2007); *Lambeth LBC v Blackburn* (2001)
- On co-ownership: *Scarle v Scarle* (2019); *Re Ninian (Deceased)* (2019); *Re Amos (Deceased)* (2020); *Challen v Challen* (2020); *Solomon v McCarthy* (2020); *Gandesha v Gandesha* (2020); *Grant v Baker* (2016); *Pickard v Constable* (2017)
- On licences: *Gilham v Breidenbach* (1982); *Re Hampstead Garden Suburb Institute* (1995); *Manchester Ship Canal Co. Ltd v Vauxhall Motors Ltd* (2019)
- On proprietary estoppel: *Horsford v Horsford* (2020); *Howe v Gossop* (2021); *Kirkbright v Toseva* (2021)
- On leases: *Proctor v Proctor* (2021); *Southwark LBC v Ludgate House* (2020); *Smoke Club Ltd and others v Network Rail Infrastructure Ltd* (2021); *Global 100 Ltd v Laleva* (2021)
- On easements: *Adealon International Corp. Proprietary Ltd v London Borough of Merton* (2007); *Hughes v Incumbent of the benefice of Frampton-on-Severn, Arlingham, Saul, Fretherne & Framilode* (2021); *Bockenfield Aerodrome Ltd v Clarehugh* (2020)
- On freehold covenants: *Alexander Devine Children's Cancer Trusts v Housing Solutions Ltd* (2020)
- On leasehold covenants: *Gibbs v Lakeside Developments Ltd* (2018); *Timbo v Lambeth LBC* (2019)
- On mortgages: *Serene Construction Ltd v Salata and Associates Ltd* (2021)
- On land law and human rights: *R (on the application of Mott) v Environment Agency* (2018)

New Law Commission Reports explored in the third edition:

- Law Commission Reports No 392, *Leasehold Home Ownership: Buying your Freehold or Extending your Lease* (2020); No 393, *Leasehold Home Ownership: Exercising the Right to Manage* (2020), and No 394, *Reinvigorating Commonhold: The Alternative to Leasehold Ownership* (2020)

Guide to Using this Book

ELEVATE YOUR LEARNING WITH *LAND LAW*

Chris Bevan's *Land Law* offers a rich learning experience, which brings the law to life in order to support a detailed understanding of the subject area. Outlined here are the key features and tools included in the book and the online resources to ensure you understand each topic, how the law applies in practice, and where the law might go in future.

www.oup.com/he/bevan3e/

UNDERSTAND AND CONTEXTUALIZE the topic at hand

Chapter introductions outline the topic, and prompt questions that will be at the forefront of your learning throughout each chapter.

KEY CASES demystified

Directing you towards a better analysis of the law, each key case is set out clearly from the main text. Broken down into sections covering 'Facts', 'Legal issue', and 'Judgment', the significance of the cases is made plain, enabling you to see the evolution of the law and how it has been applied. Online, you can find links which take you direct to the judgments themselves, making it easy to read the law for yourself.

REVISE AND MEMORIZE WITH OVER 95 diagrams and visual aids

Consolidate your learning through diagrams and flowcharts (with audio walk-throughs on some flowcharts accessible online) that explain key concepts or legislation in a digestible way. Visual scenarios with guidance from the author are also online to help to visualise concepts. Keep these to hand while revising by downloading them for quick-fire ways to retain important information.

GO FURTHER WITH YOUR LEARNING by considering the future of land law and wider debates

Every chapter is summarized with a 'Future directions' section which prompts investigative thought and asks you to consider how land law might develop over time. This is accompanied by further reading within the text with additional links online to external sources of information.

TEST YOUR KNOWLEDGE with self-test and scenario-style questions

Online, each chapter is accompanied by self-test questions which provide instant feedback on important facts and legislation. You can also practise scenario questions for every chapter, enabling you to engage practically with the content. These questions, accompanied by notes on what a good answer would cover and how it might be structured, will help you to develop your essay-writing techniques and improve your performance in coursework and exams.

WATCH, LISTEN, AND LEARN from the author

Videos and audio podcasts (with transcripts) are available online, allowing you to hear direct from the author as he helps with assessment preparation and discusses the importance of key topics in their wider context.

RELATE TO THE LAW by learning from professionals in the field

Exclusive to this book, you can watch Chris Bevan in conversation with leading barristers who appeared in seminal land law cases such as *Stack v Dowden* (2007), *Wood v Waddington* (2015), and more. Complementing the book's extensive use and analysis of case law, these videos bring the judgments to life, giving you a greater and more nuanced understanding of land law.

INTERACT AND INTEGRATE your learning through tasks

Matching exercises and interactive timelines available online offer a different way of revising topics and testing your understanding.

REVISE KEY TERMS and definitions in the glossary

Throughout the text, words emboldened with colour signal key legal terms. You can learn the definitions to accompany these by accessing the glossary at the end of the book.

Table of Cases

Page numbers in bold indicate where cases are explored as part of the book's Key Cases feature.

United Kingdom

International

European Court of Human Rights

European Court of Justice

National Cases

Australia

Canada

Hong Kong

Table of Legislation

Statutes

Statutory Instruments

National Legislation

France

United States

International Instruments

Other Materials

1 Introduction to Land Law

1.1 Introduction

So here we go . . . Welcome to your study of land law. Shake off any preconceptions you might have. Land law is an exciting, rich subject that offers intense rewards to those willing to embrace it. Land law is 'proper' law—a perfect amalgam of statute, common law, and policy. It is the site of some of society's most important developments and helps to answer some of the most fundamental questions: who owns what and whose land is that? It goes to that ancient, essential cry of 'this is *mine* and not yours'. In short, land law matters because land matters. Land is all around us. It is beneath your feet and all around you right now as you read this. Land is the stage for life's most pivotal events. It can offer security, safety, and a sanctuary in the form of the family home. Land can equally be the site of division, oppression,[1] deprivation of one's culture,[2] and violation of human rights.[3] Figure 1.1 muses on why land is so special.

Figure 1.1 captures land's distinct status which necessitates distinct rules to govern it—this is what we call land law. Let's unpack its special features:[4]

1. Land is permanent: Land is fixed. For the most part, it is not going anywhere. This degree of permanence gives land a stability, a durability, and a longevity which means that dealings with it offer a sense of security, long-termism, and commitment. This also explains why investment in land is often seen as a 'safe option'. A key feature of land's permanence is our ability to deal with it: we can hold land for ourselves but also pass it on to others for their use or benefit and even to our heirs on death. More than this, we can split the enjoyment of land: for example, you might be the owner of a piece of land but decide to **rent** it out to your neighbour.
2. Land is in limited supply: Land is a finite resource. There is only so much of it available. We cannot make more land in the way that, for example, if there is a shortage of cars, we

[1] For a feminist perspective on land law, see amongst others, H. Lim and A. Bottomley (eds), *Feminist Perspectives on Land Law* (Abingdon: Routledge-Cavendish, 2007).
[2] E.g. the land grabs from indigenous peoples around the world.
[3] We explore the relationship between land law and human rights in Chapter 14.
[4] See B. McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008), 7.

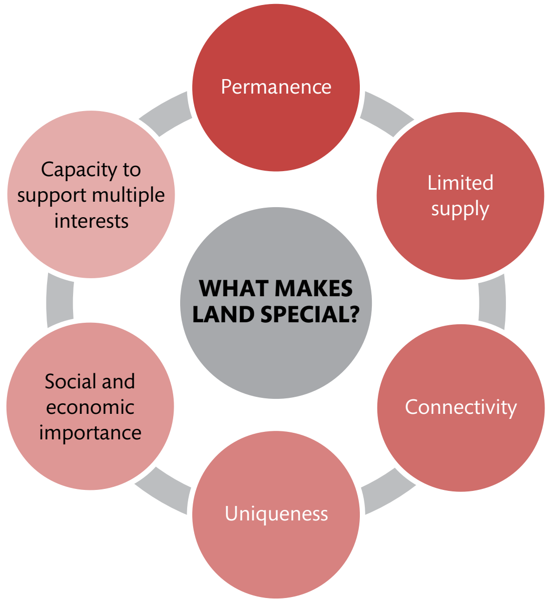

Figure 1.1 The features that make land special

can manufacture more. Limited availability means that land is valuable, expensive, in demand. It means that most of us can only hope to own land with the aid of a **mortgage** from the bank. For land lawyers, the limited supply means land must be freed up, made available, be marketable so that its maximum potential can be realized. We want land to be unlocked, without **encumbrances**, and not overburdened or constrained.[5]

3. Land is connected: A parcel of land never exists in isolation. In almost every case, it will be connected to at least one other piece of land, maybe more, and this means that understanding the rights and relationships operating on land often involves considering the rights of adjoining landowners. Interconnectedness and disputes between adjoining plots of land are therefore an unavoidable feature of dealing with land.
4. Land is unique: Every piece of land is distinct, a one-off; making it is expensive. Even two apparently identical plots of land are different—each having a unique physical place which no other parcel of land shares. The many property shows on the television where couples seek their 'perfect home' are premised on the very idea of land's uniqueness, that each plot of land has its own magic. The distinctiveness of land can create a personal attachment which makes deprivation of that land by, for example, repossession or eviction difficult to accept. This in turn can lead to bitter legal wranglings which land law must resolve. Uniqueness is also a price inflator.
5. Land is socially and economically important: Billions of pounds are loaned to individuals and businesses in the UK to purchase land. Land is one of several vital pillars supporting the British economy. Evidence of this is all around us; you need only think of the concerns in the media of a 'housing bubble',[6] of rising house prices, or of irresponsible

[5] In Chapter 2, we will explore how a system of land registration contributes to this goal.
[6] A housing bubble occurs where land prices rise inexorably and thus so do house prices in a manner that is unsustainable and ultimately the bubble bursts as prices decline.

mortgage lending to see that land is a key protagonist in the story of our economy's rise and fall. But land is also socially important. Land is much more than the sods of earth that comprise it: consider the purchase of a property as a home.[7] Socially, land gives us somewhere to live, somewhere to build a family, somewhere to be active citizens—it provides the blank canvas against which we shape our lives and our businesses.

6. Land is capable of supporting multiple interests: This is land's *pièce de résistance*, its showpiece, but also the source of most disputes over it. Land is able to sustain simultaneous, multiple uses and interests. Let's take an example: Armita buys a parcel of land but cannot afford the full asking price. She therefore takes out a mortgage loan. In return for the loan, the bank enjoys an interest in the land. Imagine that when Armita purchases the land she promises the neighbours that she will not run a business from the site. She gives another neighbour, Ben, the right to walk over her land and park his car, and, finally, she rents out part of her land to Cai who becomes her **tenant**. Armita, the bank, Ben, and Cai all have rights concerning the use of the land. The law allows for these rights to coexist simultaneously, maximizing the use-value of land. With multiple interests, however, come risks. Chief among them is what land lawyers call the 'enforceability' or 'priority question'. In other words, whose interest wins? Who takes priority when a dispute arises between these competing claims? It is this question of enforceability and priority between right holders that is the very essence of land law.

Land's special features mean that a body of rules has developed around it: this is land law.

Visit the online resources to watch the author introduce the topic of land law.

1.2 The scope of contemporary land law: What is land law?

English law draws a distinction between 'real' and 'personal' property. In its most straightforward sense, real property consists of land and personal property is all other property that is not land. Land law is the law concerning 'real property' or **realty** rather than personal property, or **personalty** as it is called. Birks explains the difference between real and personal property in the following passage:[8]

> If a lay person hears 'real property' or 'real **estate**' or 'realty', what will come to mind will be an image of land. For most lawyers the effect will be the same . . . 'Personal property' or 'personalty' similarly evoke cars, cows, televisions, crockery, pictures, money and a host of other moveable things . . . A judgment in money can be called personal because it gives the victorious claimant no right in or to any particular thing but merely a right that a person, the defeated defendant, pay the sum in question . . . in some actions, you could recover the thing itself. Those actions came to be called 'real actions', 'real' meaning 'thing-related' in the simplest sense that the person claiming would recover the very thing claimed. The subject matter of real actions then became real property.

Land law is the law of real property. It is 'that part of the general law which governs the allocation of rights and responsibilities in relation to "real" or "immoveable" property'.[9]

[7] We consider in Chapter 6 what makes land a home and how you acquire an interest in it.

[8] P. Birks, 'Before We Begin: Five Keys to Land Law' in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998), 470.

[9] K. Gray and S. F. Gray, *Elements of Land Law*, 5th edn (Oxford: Oxford University Press, 2008), 3.

As Birks explains, the word 'real' indicates that we are concerned with rights *in rem*, which is Latin for rights *in the thing*. The real/personal distinction is ancient and historically described the nature of the remedy available when legal proceedings were brought: an action *in rem* involved seeking recovery (i.e. return) of the land; for example, where the true owner had been dispossessed. In contrast, an action *in personam* consisted of an action against a wrongdoer personally, and for which the remedy would be compensation in the form of damages. Today, this real/personal distinction endures but represents largely a historical overhang from the early development of the law. Most of the rights we encounter in this book are regarded as real property as they would have been protected by actions *in rem*.

Land law is about rights in things; in other words, rights in the land rather than rights which are merely personal to the people who created them. But land law is also about responsibilities and, crucially, about relationships. Land does not exist in a vacuum and land law must also be regarded as the body of law governing the *relationship* between the thing and the owner of that thing. More specifically, land law creates a framework in which a variety of relationships between people and land can operate. Land law is concerned with the nature, creation, and protection of rights in land and also the content of those rights. If you rent a parcel of land, for example, what rights do you have? If the land is sold or disposed of without your consent, what forms of redress do you have? How can you protect your position?[10] These are all questions to which land law attempts to provide the answers.

1.3 What is land?

The traditional starting point is the definition of 'land' in s. 205(1)(ix) of the Law of Property Act 1925 (LPA 1925) which provides that:

> 'Land' includes land of any **tenure**, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other **corporeal hereditaments**; also a manor, an advowson, and a rent and other **incorporeal hereditaments**, and an **easement**, right, privilege, or benefit in, over, or derived from land.

Section 205 offers a rather confounding statutory definition but it serves a vital function. It tells us that land law is about more than just physical, tangible property such as trees and coal (so-called corporeal hereditaments): it also concerns intangible rights in land (so-called incorporeal hereditaments). These intangible rights are those which are not necessarily visible on the land but are extremely important, and include such rights as **leases**, easements, **covenants**, and mortgages.[11] Land, under s. 205, is defined as including both the physical aspects of land as well as those rights of enjoyment of land that cannot be seen. When we talk of 'land', what do we mean and what does 'land' include?

1.3.1 The expansive meaning of 'land'

Land enjoys an expansive meaning. At common law, the following 16th-century maxim (though very old) really sums up the breadth of interpretation given to land: *cuius est solum eius est usque ad coelum et ad inferos*—the owner of the soil also owns everything up

[10] These are issues concerning leasehold land which we cover in Chapter 9.

[11] All of which we consider later in this book in Chapters 9, 11, 12, and 13 respectively.

to the heavens and down to the depths of the earth. What this maxim tells us is that land involves much more than just rights to the surface level of the soil and can encapsulate rights both above and below the surface: see Figure 1.2. But just how far up and how far down do these rights extend?[12] As we will discover, the extent of these rights has been limited and qualified by both common law developments and statutory intervention.

1.3.1.1 Airspace

The 16th-century maxim cited earlier (often abbreviated to *cuius est solum*) does not and, in truth, has never fully reflected the full position as to ownership rights above the ground. Today, there are limits on how high your ownership rights reach—as, otherwise, every time a plane flew over your house, it would be a trespass! To understand the principles here, we must draw a distinction between so-called 'lower stratum' and 'upper stratum'.

The lower stratum

A landowner enjoys ownership rights over the airspace immediately above their land. But what is 'the lower stratum'—how far does it extend? As explained in the important case of *Bernstein v Skyviews and General Ltd* (1978), per Griffiths J: a landowner's rights are restricted 'to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it'.

Figure 1.2 The expansive meaning of land

[12] For a fulsome analysis of the question, see K. Gray, 'Property in Thin Air' (1991) 50 CLJ 252.

KEY CASE ***Bernstein of Leigh (Baron) v Skyviews & General Ltd*** **(1979)**

Facts: Skyviews was a company that flew over people's houses, took photos, and offered them for sale to residents of the houses. Skyviews flew over Lord Bernstein's house in Leigh, Kent. Lord Bernstein objected, arguing this was an invasion of his privacy and amounted to a trespass into his airspace.

Legal issue: Had Lord Bernstein's rights to airspace been infringed?

Judgment: The court rejected Lord Bernstein's claim. It held that there had been no trespass and Lord Bernstein's **property rights** had not been infringed.

Griffiths J explained:

> If the Latin *cuius est solum* were to be applied literally—it would lead to an absurdity; namely that any satellite passing over suburban gardens would amount to trespass. The way to strike the right balance was to instigate the following test: landowners only enjoy rights above their property 'to such height as is necessary for the ordinary use and enjoyment of the land'. Above this height, landowners enjoy no greater rights than any other member of the public including companies flying over taking photos.

Practically speaking, what does 'such height as is necessary for the ordinary use and enjoyment of land' mean? Well, it very much depends on the facts of the case and the court's assessment of all the circumstances. The following case law examples should give you a flavour of how the courts have interpreted the *Bernstein* test:

- *Lemmon v Webb* (1894): Branches of a tree from one parcel of land were overhanging a neighbour's property. This amounted to an interference with the neighbour's airspace and it was therefore lawful for the neighbour to lop the branches to prevent the nuisance; provided this did not involve entering the other's land.
- *Gifford v Dent* (1926): An advertising sign reached 4 ft 8 inches over the claimant's forecourt. This amounted to a trespass of the claimant's airspace.
- *Kelsen v Imperial Tobacco* (1957): An advertising sign reached 8 inches into the airspace above the claimant's shop. This amounted to a trespass to the claimant's airspace and an **injunction** was granted requiring the sign be removed.
- *Laiqat v Majid* (2005): An extractor fan extended across a neighbour's backyard and garden by just 750 mm. This amounted to a trespass.
- *Woolerton & Wilson v Richard Costain Ltd* (1970) and *Anchor Brewhouse Developments v Berkeley House (Docklands Developments) Ltd* (1987): In both these cases, cranes standing on one parcel of land but oversailing (i.e. swinging across) neighbouring land amounted to a trespass and injunctions were granted to stop this.[13]

As these cases show, subject to the court's assessment, interference into your airspace may constitute trespass. Importantly, there can be an actionable trespass even if no damage or loss has been caused. This was confirmed in *Kelsen*, *Laiqat*, and in *Anchor Brewhouse Developments* where it was held to be immaterial that the signage, extractor fan, and crane in no way impacted the claimants' use of their respective land.

[13] See also the Australian case of *Graham v K. D. Morris & Sons Pty Ltd* (1974) and *Baten's Case* (1610) which concerned overhanging eaves of a neighbouring property.

The lower stratum and aeroplanes

Advances in technology, and the invention of flight in particular, have completely transformed the concept of right to airspace. Today, aircraft routinely fly over urban and residential areas including at night. The relationship between the lower stratum and aeroplanes therefore warranted specific legislative intervention and is now governed largely by statue. By way of example:

- Section 76 of the Civil Aviation Act 1982 provides:

  > No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case is reasonable . . .

  This section essentially prevents actions in nuisance and trespass against aircraft flying in compliance with relevant regulations.
- Section 3(5) of the Rules of the Air Regulations 2007 provides that, without specific permission of the Civil Aviation Authority, aircraft: (1) must not fly closer than 500 feet to any person, vessel, vehicle, or structure; and (2) must not fly, in a congested city or town area, below 1,000 feet above the highest fixed obstacle.

What role might human rights arguments play here? The European Court of Human Rights in *Hatton v UK* (2003) examined whether increased night flights over residential areas near Heathrow airport amounted to an interference with residents' Article 8 of the European Convention on Human Rights (ECHR) right to respect for private and family life. The Grand Chamber held there was no infringement of Article 8 but criticized heavily the narrow scope of judicial review available to the litigants and the lack of private law remedies. With anticipated, further increases in air travel and the debate encircling the construction of a third runway at Heathrow, *Hatton* is unlikely to be the last word on the subject but, for now, seems to close the door on human rights arguments.

The upper stratum

The upper stratum refers to that portion of airspace above the lower stratum. We have just encountered, as established in *Bernstein*, that landowners' rights are limited to the lower stratum and only extend to 'to such height as is necessary for the ordinary use and enjoyment of the land'. Therefore, beyond this height a landowner has no rights to the airspace. As the court explained in the Canadian case of *Re the Queen in Right of Manitoba and Air Canada* (1978), this upper stratum is *res omnium communis* ('thing of the entire community' or 'common heritage of humankind'). On this basis, a claim by the province of Manitoba that sales of goods onboard aircraft flying over its airspace were subject to its taxation rules failed—the upper stratum is not subject to ownership by anyone.

1.3.1.2 **Subsoil**

The owner of land will usually also own any man-made and natural space below the land which is actually capable of being owned. These subsurface spaces will normally be so owned even if they have been created by another party and even where the landowner is not in fact able to access them.[14]

[14] *Metropolitan Railway Co. v Fowler* (1893) (which involved a railway tunnel); *Grigsby v Melville* (1972) (which involved a cellar).

1.3.1.3 Mines and minerals

At common law, an owner of land is said to be entitled to 'all mines and minerals' within the land.[15] This was codified in s. 205(1)(ix) of the LPA 1925 (look back at the extract in section 1.3), but this position has been qualified by the court and by statute which have carved out certain exceptions. Any coal, natural gas, and oil beneath the land, for example, are deemed by statute to be property of the Crown.[16] The same is true of any unmined gold or silver found in mines on or under land.[17]

1.3.1.4 Water

The position as to water is rather technical. Water which passes over or flows through land cannot be owned. If you own land which is, in part, covered with water, you also do not own this water. There can be ownership only as to very small volumes of water for agricultural or domestic household purposes. If you wish to extract greater volumes of water, you need a licence granted by the National Rivers Authority.[18]

1.3.1.5 Flora and fauna—trees, plants, flowers, and wild animals

Land is taken to include all the trees, plants, hedges, and flowers growing, whether they have been cultivated by the landowner or have sprouted up and grown wild on the property.[19] Perhaps macabrely, the position for wild animals depends on whether they are alive or dead. When wild animals are alive, the landowner has only 'qualified' property rights over them. This gives the landowner the right to catch and kill the animals on her land. Once wild animals have been caught and killed, the animals become the absolute property of the landowner.[20]

1.3.1.6 Items found in or on land

As the saying goes: 'finders keepers; losers weepers' but, in land law, how do we determine who owns items that are found on land? Imagine you visit a friend's house and you find a gold bracelet on their driveway. Can you claim ownership of the bracelet; would it belong to your friend who owns the land or perhaps it constitutes treasure belonging to the Crown? We call this the law of 'finds' or 'finders' and explore it in this section: see Figure 1.3 which offers a helpful way of approaching the issue of items found on land.

Where items are found on land, dispute may arise as to who can claim **title** to the object—i.e. who has the best claim to the find? There may be different people who come forward:

1. the true owner of the item;
2. the finder of the item;
3. the occupier or owner of the land on which the item was found;
4. an employee of the occupier or owner of the land on which the item was found.

[15] Note, however, the vibrant debate around changes to trespass law under the Infrastructure Act 2015 which, subject to conditions, permits fracking firms to drill under homes without prior permission.

[16] Coal Industry Act 1994, s. 9; Petroleum Act 1998, s. 2.

[17] *Case of Mines* (1567); *Attorney-General v Morgan* (1891).

[18] Water Resources Act 1991, ss. 24 and 27; s. 132(1) of the Land Registration Act 2002 confirms that '"land" includes . . . (b) land covered with water'.

[19] *Stukeley v Butler* (1615).

[20] This has been confirmed for both wild animals such as game (*Blades v Higgs* (1865)) as well as fish (*Nicholls v Ely Beet Sugar Factory Ltd (No. 2)* (1936)); see also *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* (2020).

A series of principles have developed to address this type of dispute and, as you will see, much depends on the nature of the item and where it was found.

Where an item is found and the true owner of the item can be located or comes forward

If someone finds an item on land, they are under a duty to take reasonable steps to locate the true owner of the item. Generally, this means a duty to publicize and advertise that the item has been found and follow up on any responses to the advertisement. The true owner of a found item has a better claim to title of the object than anyone else so, if the true owner is located or comes forward, as owner of the item, their claim trumps that of the finder or occupier or owner of the land on which the item was found: *Moffat v Kazana* (1969). Unless and until it can be shown that the true owner has abandoned or lost the item, the true owner remains entitled to it. In *Moffat*, Mr Russell stored a biscuit tin containing bank notes in the attic of his house. Mr Russell died and the house was subsequently sold to a new owner. The new owner had maintenance works carried out on the house and the repairman found the box (the repairman was the 'finder'). The new owner argued it was entitled to the tin as it formed part of the house sale. The court held that Mr Russell's relatives were entitled to the tin and money. Mr Russell remained the true owner of the tin and notes; he had not abandoned them and they therefore passed to Mr Russell's relatives on his death. The tin had not passed automatically on the sale because the tin and notes were **chattels**.

If the true owner of the item cannot be located, we then move to consider who else might claim title to the item. A key distinction is whether the item was found embedded *in* the land or whether it was found *on* (i.e. on top of) the land.

Where an item is found embedded in, submerged on, or attached to the land

This is the scenario where a finder ventures onto another's land and finds an item 'in' (i.e. under or embedded in) the ground; for example by using a metal detector and digging up an item. In this situation, if an item is found embedded in, submerged on (i.e. under the ground), or attached to the land and the true owner of the property cannot be found, it is the landowner who will have a better claim to ownership of the object than the finder. This is so even where the landowner was unaware of the object's existence prior to its find. This was laid down by the court in *Elwes v Brigg Gas Company* (1886) and confirmed by the Court of Appeal in *Waverley Borough Council v Fletcher* (1995):

- *Elwes v Brigg Gas Company* (1886): A tenant of a leased property was given permission by the landlord to excavate the land. During the work, a large hole was dug 6 feet below the surface of the ground which revealed a prehistoric boat. The landlord (landowner) had no prior knowledge of the existence of the boat but the court held that, in the absence of identifying the true owner, the landowner was entitled to claim ownership and not the finder.
- *Waverley Borough Council v Fletcher* (1995): A metal-detector enthusiast found a gold brooch when digging 9 inches below the surface of a public park owned by Waverley Borough Council. The council argued that the brooch was its property as it had been found on land it owned and the true owner could not be identified. The Court of Appeal agreed confirming the approach in *Elwes*. The court drew a distinction between items found on or on top of land and those found in, submerged, or attached to land. Where items are found in or attached to land, the owner of the land has the better claim to title to the item than the finder. The brooch

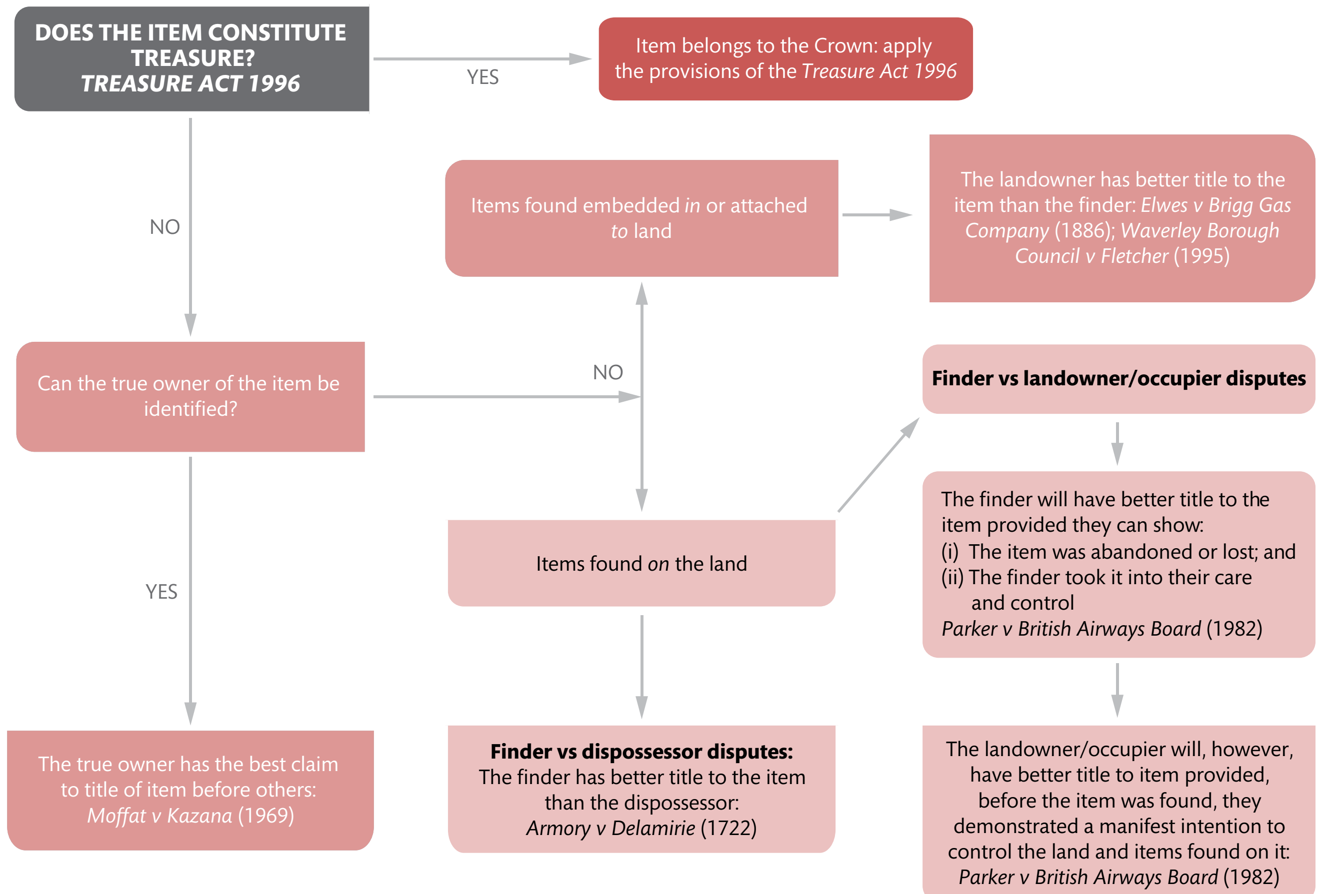

Figure 1.3 Items found *in* or *on* land

was submerged into the soil, had become part of the land; land that was owned by the council. The council enjoyed ownership of the brooch.[21] As Auld LJ explained in *Waverley*:

> Where an article is found *in or attached to* the land, as between the owner or lawful possessor of the land and the finder of the article, the owner or lawful possessor of the land has the better title. [Emphasis added.]

Where the item is found on the land (i.e. unattached on the surface of the ground)

This is the scenario where a finder discovers an item on the land (i.e. on the surface) which is occupied or owned by another. In this situation, if an item is found unattached on top of land, and the true owner of the item cannot be identified, the starting point is that the finder will have the better claim to ownership of the object but only if they can show:

1. that the item has been abandoned or lost; and
2. the finder has taken the item into their care and control.

Even then, the occupier or owner of the land may still have a superior claim to the finder if it can demonstrate that, *before the item was found*, the occupier or owner had an intention to exercise control over the land and the things that may be found on it. These principles were laid down by Donaldson LJ in *Parker v British Airways Board* (1982).

KEY CASE *Parker v British Airways Board* (1982)

Facts: An airline passenger, Mr Parker, found a gold bracelet on the floor in a British Airways (BA) executive lounge at Heathrow Airport Terminal One. BA were occupiers of the land. He handed the bracelet to BA staff and left his contact details so that it could be sent to him if no one came forward to claim the item. No one did come forward but, rather than contact Mr Parker, BA sold the bracelet for £850. Mr Parker claimed for the loss of value; arguing that, as the finder of the item and taking control of it, he had a property right in the item that was superior to BA.

Legal issue: Who owned the bracelet found by Mr Parker unattached on land occupied by BA in circumstances where the true owner could not be identified?

Judgment: The court allowed Mr Parker's claim and the Court of Appeal rejected BA's appeal.

Donaldson LJ held:

- A finder acquires no rights unless: (1) the item has been lost or abandoned; and (2) the finder takes the item into his care and control.
- If the item was lost or abandoned and taken into the finder's care and control, the finder has better title than the occupier/landowner unless the occupier/landowner can show that, before the item was found, it demonstrated a manifest intention to exercise control over the building and things found on it.
- Both the finder and the occupier's claims would, of course, fail if the true owner of the item came forward and could prove ownership. The true owner, if identified, would have the more superior title to the item.

On the facts, Mr Parker could show that the bracelet had been lost or abandoned, and was taken into his care and control. BA could show an intention to control who entered the executive lounge but could not demonstrate an intention, before the item was found, to exercise control over *lost property* found in the building in order to assert a superior claim. It appeared significant that while BA employees had been given instructions in a written document on what to do if lost items were handed to them, no details of any 'lost property policy' were publicized or published to users of the lounge and, moreover, BA did not carry out searches of the lounge for lost items.

[21] See also *South Staffordshire Water Co. v Sharman* (1896) where two rings were found in mud at the bottom of an old pond and held to belong not to the finder but to the landowner.

The case of *Parker* makes plain the finder will have the better claim unless the landowner or occupier can show, prior to the find, it demonstrated a manifest intention to exercise control over the land and anything found on it. Precisely what constitutes 'control' for this purpose is not entirely clear. Donaldson LJ gave some helpful examples:

> If a bank manager saw fit to show me round a vault containing safe deposits and I found a gold bracelet on the floor, I should have no doubt that the bank had a better title than I, and the reason is the manifest intention to exercise a very high degree of control. At the other extreme is the park to which the public has unrestricted access during daylight hours. During those hours there is no manifest intention to exercise any such control. In between these extremes are the forecourts of petrol filling stations, unfenced front gardens of private houses, the public parts of shops and supermarkets as part of an almost infinite variety of land, premises and circumstances.

Had BA in *Parker* erected a sign reading, 'Anything found in this lounge is the property of BA', this may have sufficed to demonstrate the requisite 'control' over the land and items found for BA to assert ownership; but what about actions short of this and those other scenarios listed by Donaldson LJ in the extract above? This will be decided on a case-by-case basis taking into account all the facts of the case.

Where the finder is employee of the occupier or owner of the land on which the item was found

This is the scenario where an employee, in the course of their employment, finds an item and the true owner cannot be identified. In this situation, as Donaldson LJ explained in *Parker*:

> Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal who acquires a finder's rights to the exclusion of those of the actual finder.

In other words, it is the employer (as principal) who enjoys a better claim to the item than the employee (as agent). This was the approach taken in the Irish case of *M'Dowell v Ulster Bank* (1899) where a bank porter found bank notes one evening when sweeping the bank floor. Palles CB held that the porter was acting in the course of his employment and merely as an extension of his employer when the money was found. The employer enjoyed better claim to the money than the porter. Donaldson LJ in *Parker* suggests the same is true for independent contractors who find items on land in the course of their provision of services; namely, the party engaging their services will enjoy a superior claim to the item.

The position may not always be as clear-cut, however, as Donaldson LJ and the case of *M'Dowell* suggest. There may be a dispute, for example, as to whether an item is found 'in the course of employment' and belongs to the employer or, alternatively, whether the employment was merely the occasion of the finding and so the item belongs to the finder. In *Byrne v Hoare* (1965), a police officer on special duty found a gold ingot on the floor next to the public exit from the theatre. The true owner could not be located. It was held that the officer was entitled to the ingot as he had not found it in his capacity as a police officer but in his personal capacity.[22] This raises the prospect of narrow, legal arguments as to the meaning of 'course of employment' but, certainly, the weight of case law leans predominantly in favour of the employer.

[22] *Byrne* can be contrasted with the Irish case of *Crinion v Minister for Justice* (1959) another 'finds' case involving a police officer but which reached the opposite conclusion.

Where the finder is a trespasser on the land or has dishonest intent

The Court of Appeal in *Waverley* explained that a trespassing finder will have no ownership rights in relation to an item discovered on land. In *Waverley* itself, the court noted that while Mr Fletcher had permission (a **licence**) to use the public park, he did not have permission to use a metal detector and dig up the ground in that park. Thus, he became a trespasser when excavating the soil and unearthing the brooch. Only where a find stems from the finder's lawful presence on the land will they be able to make a claim to ownership of the item discovered. Donaldson LJ echoed this view in *obiter* comments in *Parker* where he explained that a trespasser or a finder who acts with dishonest intent (e.g. purposely concealing the find or failing to seek the true owner) would not be permitted, under the rule of broad public policy, to benefit from their wrongdoing. Equally, a finder will be barred from claiming title to items found on land if the find springs from a dishonest or felonious act: *Hibbert v McKiernan* (1948). In this case, Mr Hibbert had stolen apparently 'lost' golf balls from a private golf course. He did not have permission to be on the course or to collect the balls. He was convicted of theft but argued, as 'finder' of the balls, he was entitled to them. The court disagreed. As a trespasser and a wrongdoer, he could not demonstrate a better claim to the balls than the landowner.

Where an item is found but subsequently dispossessed by another

This is the scenario where the finder discovers an item but hands it to, or the item is taken by, another person (the dispossessor) who, for example, then refuses to return it to the finder. Here, in any dispute between the finder and the dispossessor as to ownership, the finder will have a superior claim to the item above any dispossessor and can recover the item from the dispossessor if it is in their possession. The only person who will have a better claim to the item than the finder will be the true owner: *Armory v Delamirie* (1722).

In *Armory*, while cleaning a flue, a chimney sweeper's boy found a gemstone ring and took it to a goldsmith's shop to have it valued. The goldsmith looked at the item, took out the gemstone, and offered the boy a small amount of money for the ring. When the boy rejected the offer, the goldsmith refused to hand back the ring and gemstone. The goldsmith did agree to return the socket (ring minus the stone). The boy sued the goldsmith. The goldsmith argued the boy could not claim the ring as he was merely a dispossessor and not the true owner. The court held, 'the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner'. As the goldsmith could not prove a better title to the item than the boy, the boy succeeded in his action to recover the item.

Where an item found on land amounts to treasure under the Treasure Act 1996

Where items found on land constitute 'treasure', different rules operate to those discussed previously. In short, if an item comes within the definition of treasure, it will be the property of the Crown. So, how then is 'treasure' defined and what are the rules governing it? The relevant law is contained in the Treasure Act 1996 (TA 1996).[23] The Act was introduced to replace the old common law principles of 'treasure trove' which provided for only a very narrow definition of treasure and which, as a result, excluded often valuable items.[24] The central ambition

[23] For a discussion of the 1996 Act, see J. Marston and L. Ross, 'Treasure and Portable Antiquities in the 1990s Still Chained to the Ghosts of the Past: The Treasure Act 1996' [1997] Conv 273.

[24] The common law concept of treasure trove dated back to before the 12th century and provided that certain gold and silver objects discovered with no identifiable owner belonged to the Crown.

of the TA 1996 is to allow priceless antiquities and significant cultural objects to be preserved for national heritage and posterity. Let's delve into the key provisions of the TA 1996.

- Section 1 of the TA 1996 provides the definition of 'treasure':

  1.— (1) Treasure is:

  (a) any object at least 300 years old when found which:

  (i) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal;

  (ii) when found, is one of at least two coins in the same find which are at least 300 years old at that time and have that percentage of precious metal; or

  (iii) when found, is one of at least ten coins in the same find which are at least 300 years old at that time;

  (b) any object at least 200 years old when found which belongs to a class designated under section 2(1);

  (c) any object which would have been treasure trove if found before the commencement of section 4;

  (d) any object which, when found, is part of the same find as—

  (i) an object within paragraph (a), (b) or (c) found at the same time or earlier; or

  (ii) an object found earlier which would be within paragraph (a) or (b) if it had been found at the same time.

  Section 1 can be a little fiddly when you first come to it. You need to read it carefully! So, when determining if an item found on land amounts to treasure, look closely to see if it falls within the subsections of s. 1.

  In summary, 'treasure' includes:

  - any object (other than a coin) at least 300 years old and at least 10 per cent precious metal by weight;
  - one of at least two coins in the same find, at least 300 years old and at least 10 per cent precious metal;
  - one of at least ten coins in the same find and at least 300 years old (note: no precious metal requirement here);
  - any object that would have been regarded as treasure trove under the old law but does not fall into the above categories under the 1996 Act; or
  - any object (whatever precious metal composition) found in the same place as or previously had been together with another object that is treasure.

- Section 2 of the TA 1996 gives the Secretary of State the power to amend the meaning of 'treasure' so as to include any class of object considered of outstanding historical, archaeological, or cultural importance. Under s. 2, by way of the Treasure (Designation) Order 2002, the definition of treasure was supplemented to include prehistoric base-metal hoards (other than coins).
- Section 3 TA of the 1996 offers further detail to help us interpret the definition of treasure in s. 1:

  - the meaning of 'coin': it includes any metal token reasonably assumed to be used as or instead of money;
  - the meaning of 'precious metal': it means gold or silver;